STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

September 26, 1994

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

Re: PR File No. 94-SP3 94-105

Dear Mr. Caton:

Please find enclosed for filing an original plus eleven copies of the OPPOSITION OF CALIFORNIA TO MOTION TO REJECT PETITION OR, ALTERNATIVELY, REJECT REDACTED INFORMATION in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine
Principal Counsel

ESL:tio

Enclosures

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service	PR File No. 94-SP3 PR94-105

OPPOSITION OF CALIFORNIA TO MOTION TO REJECT PETITION OR, ALTERNATIVELY, REJECT REDACTED INFORMATION

Pursuant to Section 1.45 of the Rules of Practice and Procedure of the Federal Communications Commission ("FCC"), the People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby oppose the Motion of the Cellular Carriers Association of California to Reject Petition or, Alternatively, Reject Redacted Information. Such motion was filed September 19, 1994 simultaneous with the Cellualr Carriers Association of California's ("CCAC") opposition to the CPUC's petition, as captioned above.

For the reasons set forth below, CCAC's motion must be denied.

BACKGROUND

On August 8, 1994, the CPUC filed with the FCC its Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates. Such petition was filed in accordance with the Omnibus

Budget Reconciliation Act of 1993 ("Budget Act") and the FCC's Second Report and Order implementing the Budget Act.[1]

In amending the Communications Act of 1934 under the Budget Act, Congress generally preempted the states from "regulat[ing] the entry of or the rates charged by any commercial mobile service." 47 U.S.C. §332(c)(3). Congress, however, provided that a state could continue to exercise its regulatory oversight of wireless rates if it could demonstrate by petition filed with the FCC that market conditions with respect to wireless services "fail to protect subscribers adequately from unjust or unreasonable rates." 47 U.S.C. §332(c)(3)(i).

In its Second Report and Order, the FCC indicated that "with respect to petitions seeking to demonstrate that prevailing market conditions will not protect CMRS subscribers adequately from unjust and unreasonable rates .... the states must submit evidence to justify their showings..." Second Report and Order at para. 251.

The CPUC's petition was filed in accordance with the above authorities. Along with its petition, the CPUC submitted a Request for Proprietary Treatment of Documents Used In Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates ("Request for Proprietary Treatment").

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1. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993); In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order (released March 7, 1994).

Among other things, as explained in its request, the CPUC indicated that certain evidence had been provided to the CPUC by the cellular carriers under seal in the course of the CPUC's formal investigation of the cellular industry.[2] The CPUC further indicated that such evidence could nevertheless be disclosed under the terms and conditions set forth in rulings issued by the Administrative Law Judge ("ALJ") assigned to that proceeding.[3]

The CPUC further stated that other information was provided to the CPUC by the Office of the Attorney General of the State of California which the latter obtained in the course of its ongoing investigation of the cellular industry under antitrust laws. This information, as indicated by the Attorney General in its letter of August 4, 1994 attached to the CPUC's Request for Proprietary Treatment, was obtained from documents initially provided by the cellular carriers to the Attorney General, and then provided by the Attorney General to the CPUC.

The August 4 letter further indicated that the cellular carriers furnished these documents to the State Attorney General under "a blanket designation that the information they contained constituted proprietary information." Because of that blanket

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2. Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications, I. 93-12-007 (hereafter, "Wireless Investigation").

3. Request for Proprietary Treatment at 2 n.2. Attached hereto in Appendix A are copies of the ALJ rulings in the Wireless Investigation.

designation, the CPUC agreed to the Attorney General's request that the CPUC "file the information and any descriptions of same under seal, pursuant to federal law." The CPUC fully complied with that request.

Subsequently, at the request of the FCC, the CPUC identified, by letter dated September 13, 1994, the portions of its petition which contain redacted material obtained from the cellular carriers in the course of the CPUC's Wireless Investigation, and the portions of its petition which contain redacted material provided by cellular carriers to the State Attorney General.[4] The CPUC further indicated that it had no independent interest in continuing to treat any of this information as confidential.[5] The CPUC, however, has a strong interest that the information be considered by the FCC in reviewing the CPUC's petition.

Against this backdrop, CCAC opposes the disclosure, even under narrowly-drawn conditions, of the evidentiary material submitted by the CPUC under seal to the FCC. CCAC essentially makes two arguments in support of its motion. First, CCAC claims a denial of its rights under the Administrative Procedure Act ("APA") because CCAC cannot adequately respond to the CPUC's

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4. A copy of the CPUC's letter is attached hereto as Appendix B.

5. Contrary to CCAC's assertion, the CPUC agreed only that the CPUC itself would not publicly disclose this information without the consent of the State Attorney General. The CPUC does not object to public disclosure of this information by the FCC.

petition absent CCAC's ability to review information which its own members are unwilling to disclose under any set of conditions. As a corollary to this claim, CCAC concludes that the FCC must ignore the sealed information or if considered, risk acting arbitrarily and capriciously in violation of the APA. Second, it claims that the CPUC's submission under seal to the FCC of information furnished to the CPUC under seal somehow violates state law and CPUC regulations prohibiting full public disclosure of confidential matter.

CCAC's arguments are completely meritless, and amount to nothing more than an attempt to defeat at the start the CPUC's petition by preventing the CPUC from making its evidentiary case for continued rate regulatory oversight of non-competitive cellular carriers. The arguments must be rejected, and the motion denied.

ARGUMENT

I. CCAC's RIGHT TO COMMENT UPON THE CPUC's PETITION IS NOT HINDERED BY THE CPUC's SUBMISSION OF CERTAIN INFORMATION UNDER SEAL TO THE FCC

A. CCAC Has Had Ample Opportunity To Adequately Respond to the CPUC Petition

CCAC argues that it has "been effectively denied the rights guaranteed it under the APA" because CCAC "has not been allowed access to the CPUC's data or analysis" which has been redacted from the CPUC's petition. Motion at 9 and 12. CCAC's argument is specious. CCAC, like any other party, has had every opportunity to request access to the information redacted from the CPUC's petition. CCAC could have requested public disclosure

under the Freedom of Information Act in accordance with FCC rules. Alternatively, CCAC could have requested that the FCC make the information available under a protective order. The fact that CCAC voluntarily chose to do neither is no basis for its complaint that its rights under the APA have been denied.

CCAC's complaint is particularly peculiar in that much of the information was provided by its members to the CPUC in the CPUC's Wireless Investigation and could have been viewed by its members under the conditions set forth in the ALJ Rulings in that proceeding. If CCAC feels disadvantaged by not having viewed the data either in that context or in this proceeding, such disadvantage is entirely of CCAC's own making.

CCAC also concocts an all-or-nothing proposition which is equally baseless: either the FCC must fully disclose to the public the sealed information if the FCC wishes to rely on it or keep the information under seal and ignore it. Motion at 8 ("potential of full public disclosure"). In fact, as CCAC is undoubtedly aware, the FCC is free to adopt a protective order, just as the ALJ did in the CPUC proceeding, to allow limited access to the information by parties under specified terms and conditions. Protective orders are routinely adopted by public agencies to guard against full public disclosure of information deemed commercially sensitive, while permitting such disclosure as is necessary for parties to effectively request their legitimate interest before the agency. See, e.g., Pacific Gas Transmission Co., 67 FERC ¶61,198, slip op. at 3 (1994); In re AT&T and Craig O. McCaw, Apps. for Consent to Transfer of Control

of Radio Licenses, File No. ENF-93-44.[6] One can only speculate why CCAC has not chosen to request a protective order here.

In short, CCAC's right to adequately respond has been fully preserved through procedures which CCAC has simply chosen to forego.

B. Failure By the FCC to Consider the Information Provided Under Seal Would Effectively Deny the CPUC The Opportunity To Make Its Case Before the FCC.

Notwithstanding the above, CCAC claims that reliance by the FCC on the information provided under seal by the CPUC would render the FCC's order granting the CPUC petition arbitrary and capricious under the APA. CCAC has it backwards. It is the FCC's failure to consider evidence essential to the CPUC's petition which would render an FCC order arbitrary and capricious.

The FCC has made clear that the states have the burden of demonstrating that market conditions are not yet adequate to ensure just and reasonable rates for cellular service in order to retain regulatory oversight of cellular rates. The FCC further made clear, in determining whether a state had met its burden, that the FCC would consider "the following types of evidence,

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6. Alternatively, the FCC may continue to treat all or some of the information as confidential where such information is essential for the FCC to discharge its responsibilities, and where public disclosure would impede the agency's ability to obtain this essential information in the future. Allnet Communication Services, Inc. v. FCC, 800 F.Supp. 984 (D.D.C. 1992).

information, and analysis to be pertinent to our examination of market conditions and consumer protection:"

> (ii) "number of customers of each commercial mobile radio service provider ... [and] trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable..."
>
> (vii) "[e]vidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates..." and "evidence of a pattern of such rates that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative."

Second Report and Order at ¶252 and App. A, Section 20.13.

Not only would it be anomalous for the FCC to reject the very kind of evidence that it invited the states to present, but it would be arbitrary and capricious for the FCC to refuse to consider this evidence, and then deny the CPUC's petition on the basis that it had not sustained its burden of proof. CCAC's argument is simply meritless.

C. CCAC's Unwillingness to Allow Disclosure of Sealed Information Under Any Conditions Provides No Basis For Rejecting the CPUC Petition

CCAC's final argument -- that CCAC's hands are tied because it is "effectively precluded from seeking full public disclosure of the redacted material" and "prevented from reviewing the manner in which the CPUC has manipulated the data for presentation to the FCC" -- is nonsense. Motion at 15. If any

one has tied CCAC's hands, it is CCAC itself. CCAC's complaint that it cannot seek "full" public disclosure of the redacted material ignores the fact that CCAC could agree to disclosure of the redacted material under a protective order. In fact, CCAC's members have agreed to disclose data relating to the aggregate number of subscribers associated with discount plans of a given carrier under nondisclosure arrangements set forth in ALJ Rulings of the CPUC.[7] CCAC's logic that the "very reasons found by the ALJ to necessitate keeping the information protected in the California investigation" merely argues for similarly keeping the information protected in the FCC's proceeding, not fully barred, as CCAC would like. Motion at 17.

In the end, CCAC complains that CCAC is faced with a "Catch 22" situation because it allegedly cannot seek disclosure of redacted material under any conditions and allegedly cannot review such material in order to adequately respond to the CPUC's petition. Once again, CCAC has it backwards. It is CCAC which seeks to hamstring the CPUC by attempting to deny the CPUC its ability to make the showing required by federal law to continue its regulatory oversight of cellular rates in California until effective competition emerges.

On the one hand, CCAC acknowledges that the CPUC has the burden of proof, and must present evidence, that market

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7. Moreover, while other carriers objected, Los Angeles Cellular Telephone Company had no objection to disclosure of the total percentage of subscriber units on alternative cellular rate plans or the aggregate number of subscribers under all discount rate plans. ALJ Ruling dated July 19, 1994.

conditions in California do not yet adequately protect consumers of cellular services from unjust and unreasonable cellular rates. Motion at 2, 10. And CCAC never disputes that the kind of evidence provided by the cellular carriers under seal to the CPUC is material and relevant to the CPUC's showing.

On the other hand, CCAC, whose members maintain the information they deem confidential and whose members have vigorously and regularly resisted any form of state regulatory oversight of the charges set for cellular service, objects to the disclosure of the information by the FCC under any set of conditions. CCAC's attempt to defeat the CPUC's petition by such maneuvering must be rejected.

II. THE CPUC FULLY COMPLIED WITH APPLICABLE LAW IN SUBMITTING UNDER SEAL TO THE FCC MATERIALS DEEMED CONFIDENTIAL BY CELLULAR CARRIERS

The CPUC has fully complied with state law governing public disclosure of information. The CPUC has publicly disclosed neither the information provided by cellular carriers to the CPUC in the course of its own investigation of the cellular industry, nor the information provided by cellular carriers to the State Attorney General in the course of the latter's investigation of the industry. All that the CPUC has done, and done so properly, is provide this information to the FCC under seal. Such provision does not constitute "public disclosure".

Notwithstanding the above, CCAC nevertheless claims that the CPUC has violated its own General Order 66-C and Section 583 of the Public Utilities Code. The CPUC has done neither. Both General Order 66-C and Section 583, by their terms, refer to

matters that shall not be open to public inspection or made public. The CPUC has not opened to public inspection or made public any materials provided to the CPUC confidentially. The CPUC has simply shared on a confidential basis with another public agency information which the CPUC itself obtained under seal, a circumstance expressly contemplated by Section 2.4 of General Order 66-C.[8] Having done so, the CPUC is in full compliance with Section 583, which requires a CPUC order only when the CPUC chooses to disclose the information to the public. To date, the CPUC has not chosen to do this.

Significantly, CCAC conspicuously omits any mention of the fact that all of the information its members provided under seal to the CPUC in the Wireless Investigation must be, and in fact already has been, disclosed upon request by other parties to that investigation under the terms and conditions specified in the ALJ Rulings issued therein. CCAC's attempt to have the FCC adopt a blanket bar to this information in this proceeding is directly at odds with its apparent willingness to disclose such information under protective order in the CPUC's proceeding.

Moreover, in quoting from only a portion of one of the ALJ Rulings, CCAC creates the false impression that the ALJ barred all disclosure of information marked confidential by cellular carriers. Motion at 16-17. In fact, the ALJ expressly provided for disclosure of all such information pursuant to nondisclosure

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8. Section 2.4 provides that "[n]on-public communications with other public agencies" may remain confidential.

arrangements. See ALJ Ruling's dated July 19, 1994 and September 14, 1994.

CCAC's further claim that the CPUC has "aggravated the potential code violation by the California Attorney General" is equally meritless. CCAC specifically cites Section 11181(f) of the California Government Code, but is careful to claim only a "potential" violation and that the Attorney General's Office "may" have exceeded its authority. Motion at 6. In fact, no such violation has occurred.

Section 11181 by its terms provides that the Attorney General may "[d]ivulge evidence of unlawful activity discovered ... to any governmental agency responsible for enforcing laws related to the unlawful activity discovered." The CPUC is a governmental agency charged with enforcing laws enacted under the California Public Utilities Code to ensure that rates charged by public utility cellular carriers remain just and reasonable to the consumers of cellular services. In particular, the CPUC evaluates the competitiveness of cellular markets for the purpose of determining the necessary degree of regulatory oversight to ensure just and reasonable cellular service rates. As demonstrated in its petition, the CPUC has determined that sufficient competition does not yet exist in California cellular markets, and hence continued regulatory oversight of cellular

rates is necessary until effective competition emerges.[9]

The State Attorney General in turn is responsible for enforcing the antitrust laws with respect to businesses operating within California. Toward this end, the State Attorney General similarly evaluates the competitiveness of cellular markets. Much of the information gathered by the State Attorney General in fulfillment of its responsibilities is obviously relevant, and expressly relates, to the separate responsibilities which must be fulfilled by the CPUC. The California Legislature recognized that fact, and thus provided in Section 11181 that the State Attorney General could share information it obtained with an agency "responsible for enforcing laws related to the unlawful activity discovered."

In this case, there can be no serious dispute that information obtained by the State Attorney General in the course of its ongoing investigation of the cellular industry to determine whether the industry has acted anticompetitively and in violation of antitrust laws is relevant and related to the CPUC's responsibilities under the Public Utilities Code, which allows the CPUC to determine the degree of competition within California cellular markets. The State Attorney General thus acted properly and in full accord with Section 11181 in providing information

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9. The CPUC indicated in its petition that it anticipates that effective competition from alternate providers will emerge in California within eighteen months from September 1, 1994.

concerning the competitiveness of the cellular industry to the CPUC.

Notwithstanding the above, CCAC claims that Section 11181 only allows the State Attorney General to share information with another agency charged with enforcing antitrust laws. It then points out that the CPUC has no such charge. CCAC cites no authority for its unduly narrow reading of Section 11181, nor is there any. The plain terms of that section provide that the State Attorney General may share information with any governmental agency "responsible for enforcing laws related to the unlawful activity discovered." (emphasis added).[10]

In short, the information provided by the CPUC to the FCC under seal was in full compliance with applicable law. CCAC's claims to the contrary are without merit and must be rejected.

CONCLUSION

For the reasons stated, CCAC's arguments in support of its motion are meritless. Accordingly, the motion must be denied. The FCC in its discretion may fully disclose, disclose pursuant to protective order, or keep confidential the information which the CPUC provided in its petition to the FCC under seal.

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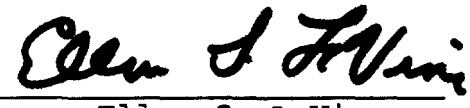
10. Indeed, by its terms, Section 11181 allows the State Attorney General to submit directly to the FCC the information which it provided to the CPUC.

The FCC, however, cannot lawfully ignore this information in reaching its decision on the CPUC's petition.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
ELLEN S. LEVINE

By: 

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September 26, 1994

A P P E N D I X A

TRP/bwg

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications.	))))	I.93-12-007

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING IN PART MOTIONS FOR CONFIDENTIAL TREATMENT OF DATA

By Administrative Law Judge (ALJ) rulings dated April 11, and April 22, 1994, certain respondents in this proceeding were directed to provide information to the Commission for their cellular operations concerning average subscriber rates, total number of cellular units in service, and capacity utilization rates. Much of the responsive data was provided confidentially pursuant to Commission General Order (GO) 66-C and Public Utilities (PU) Code § 583, but with no justification for the requested confidential treatment.

A subsequent ALJ ruling dated May 5, 1994 directed parties asserting claims of confidentiality under GO 66-C to file a motion by May 16, 1994 providing justification for confidential treatment, based on the standard applied in Pacific Bell, 20 CPUC 2d 237, 252 (1986). Under that standard, confidential treatment would be granted only upon a showing that release of the data would lead to "imminent and direct harm of major consequence, not a showing that there may be harm or that the harm is speculative and incidental." Any party (other than the Commission's Division of Ratepayer Advocates) interested in reviewing any of the data submitted under claims of confidentiality was directed to advise the respective cellular carrier of its interest in entering into a nondisclosure agreement permitting access to such data as required for purposes of this proceeding.

In response to the ALJ ruling, the carriers submitted the requested motions formally requesting confidential treatment for

information provided and offered reasons which they believed justified their confidentiality requests. Some of the carriers disputed the validity of applying a standard as rigorous as that adopted in Pacific Bell for purposes of cellular carriers' confidentiality claims. For example, Bay Area Cellular Telephone Company (BACTC) argues that because cellular carriers face a more competitive environment than was faced by Pacific Bell at the time the cited standard was set, it is not appropriate to hold carriers to such a stringent standard. Yet, because it believes the information provided by the carriers is clearly of such significance to their competitive positions, BACTC argues that the Pacific Bell standard is clearly met anyway, and its legal relevance need not be tested in this case.

Although the carriers agreed generally as to the scope of data to granted confidential treatment, they also expressed some differences of opinion. For example, Los Angeles Cellular Telephone Company (LACTC) does not object to disclosure of the total number of subscriber units as of March 1994, or of the total percentage of units on alternative plans, but does object to disclosure of the precise number of units in each plan, or the minutes of use consumed in each user category. LACTC also has no objection to disclosure of the total number of cell site sectors in operation since this information may be derived from public files. By contrast, the other carriers object to disclosure of both the aggregate number of subscribers on all discount plans as well as the number of subscribers on each individual plan.

Carriers argue that information submitted concerning the number of subscribers under individual payment plans and capacity utilization data is presented in a manner to reveal commercially sensitive information about the carrier's market share and the success of marketing strategies. They contend that disclosure to competitors of detailed information about subscriber response to specific plans would allow competitors to tailor their marketing

plans in response to the carrier's subscribership patterns by pricing plans. Disclosure of subscriber data could enable a competitor to possibly structure an advertising sales message claiming superiority over the competing carrier based on total subscribers or number of subscribers by a specific customer segment. Disclosure of the carriers' capacity utilization data could likewise allow competitors to glean sensitive data as to the configuration and use of the carrier's system as a basis to make planning decisions rather than basing decisions on each competitor's independent analysis of the marketplace.

On May 26, 1994, Cellular Resellers Association, Inc. (CRA) filed a response to the collective motions of the cellular carriers requesting confidential treatment. CRA states that by letters dated May 12, 1994, it requested from each of the carriers to be provided a copy of the data submitted on a confidential basis to the Commission under a nondisclosure agreement. As of May 26, CRA had received data to be held confidentially only from GTE. By letter of May 20, 1994, McCaw refused to provide CRA access to the confidential data even under a nondisclosure agreement. While it has apparently not responded to CRA, BACTC stated in its Motion that it is "fully prepared to disclose even this highly confidential information to counsel for other parties and their designated experts pursuant to customary non-disclosure agreements."

CRA thus requests an ALJ ruling ordering that all of the requested data dated prior to 1992 be publicly released since it would not cause any imminent or direct harm of major consequence. CRA further requests that it be provided all other data for 1992-93 pursuant to a reasonable nondisclosure agreement in the manner agreed to by GTE.

Discussion

Two issues must be resolved relating to nondisclosure of the submitted data. First, what portion, if any, of the data

should be restricted from public disclosure. Second, would disclosure of any of the data to CRA even under a nondisclosure agreement result in competitive harm to cellular carriers?

As to carriers' challenge to the Pacific Bell case as a relevant precedent by which to judge the confidentiality claims of cellular data, no convincing arguments were offered to justify abandoning the standard in this instance. The extent to which cellular carriers are competitive is a contested issue in this proceeding. It would be prejudging this issue to discard the Pacific Bell standard on the premise that cellular carriers are fully competitive. In any event, it has not been shown that even assuming the carriers were competitive, that the standard, itself, should be discarded. If anything, only the determination of how to apply the standard, i.e., what constitutes "imminent and direct harm of major consequence" might be influenced by the degree of competitiveness in an industry. Accordingly, the Pacific Bell standard requiring a showing of "imminent and direct harm of major consequence" is relevant in evaluating the carriers' motions in this instance. Under the Pacific Bell standard, "in balancing the public interest of having an open and credible regulatory process against the desires not to have data it deems proprietary disclosed, we give far more weight to having a fully open regulatory process." (Id. 252.)

It is concluded that the respondents have provided adequate justification for confidential treatment of information on the basis of "imminent and direct harm" relating to certain information only. Confidential treatment is warranted for the number of subscribers associated with specific billing plans and for data relating to capacity utilization, at least for recent periods. As explained above, such information has commercial value to competitors which could be used to the detriment of the carrier disclosing it. On the other hand, carriers have not shown that "imminent and direct harm" will result from disclosure of

information relating to the aggregate number of subscribers associated with all discount plans of a given carrier, or the aggregate number of subscribers serviced by resellers. LACTC, for example, acknowledges that disclosure of aggregate subscribers under all discount plans would not be competitively damaging in its case. No other carrier explained how its circumstances so differed from those of LACTC such that disclosure of such aggregate data could be used to its significant competitive harm.

Carriers generally agree that the rate information in their data responses which is derived from published tariffs can be publicly disclosed without competitive harm. Accordingly, since no basis has been provided to restrict such information, such publicly available tariff data will not be subject to confidential treatment.

CRA argues that data for the period covering 1989-1991 should be publicly released because of its age (almost 2-1/2 years old). CRA's argument is reasonable. Given the rapid pace of technological change and customer growth within the cellular industry, historical data can become quickly outdated and of limited value to competitors in evaluating strategies prospectively. There is little likelihood that historical information as old as from 1989-91 could cause "imminent and direct harm of major consequence" in such a manner.

Regarding the dispute over whether CRA should be granted access to confidential data under a nondisclosure agreement, the following procedure will be adopted. CRA shall be granted access to the data responses provided by carriers on the following terms. A redacted copy of the data responses provided to the Commission by the carriers shall be provided to CRA without the need for a nondisclosure agreement. Information designated confidential under this ruling shall be redacted from the copy provided to CRA.

A separate unredacted version of the data responses disclosing data found to be confidential under this ruling shall be

provided only to designated reviewing representatives of CRA under the terms of an appropriate nondisclosure agreement. The terms under which reviewing representatives shall be designated are outlined in the order below. This approach provides a balance between the need to encourage open public involvement in Commission proceedings versus the need to protect sensitive proprietary data with commercial value to competitors.

IT IS RULED that:

1. The carriers' motions for confidential treatment of submitted data is granted, in part. The data marked confidential and proprietary by the cellular carriers submitted pursuant to ALJ rulings dated April 11 and April 22, 1994 shall be restricted from public disclosure in accordance with General Order 66-C and Public Utilities Code § 583, except for the following:

   a. All data relating to the calendar years 1991 and earlier.

   b. For data relating to calendar years 1992 and 1993, only the following shall be publicly disclosed:

      (1) Aggregate activated subscriber numbers on discount rate plans, without disclosing numbers on individual plans.

      (2) Aggregate activated numbers on basic rate plans.

      (3) Aggregate activated numbers subscribers divided between wholesale and retail service.

      (4) Publicly available tariff information.

      (5) Total number of cell site sectors in operation.

2. Within five business days following issuance of this ruling, a redacted copy of the data responses provided to the Commission pursuant to this proceeding by the carriers shall be

provided to CRA without the need for a nondisclosure agreement. Information designated confidential under this ruling shall be redacted from the copy provided to CRA.

3. A separate unredacted version of the data responses disclosing data found to be confidential under this ruling shall be provided only to designated reviewing representatives of CRA under the terms of an appropriate nondisclosure agreement to be negotiated by the CRA and each of the cellular carriers subject to this ruling.

4. The carriers shall meet and confer with CRA on a timely basis to negotiate the terms of an acceptable nondisclosure agreement.

5. The nondisclosure agreement shall restrict access to confidential data only to designated reviewing representatives to be determined as outlined below.

6. The designated reviewing representatives shall be mutually agreed to by both parties entering into the nondisclosure agreement, based upon the criteria outlined in the order below. A reviewing representative shall be limited to an individual who is:

a. An attorney appearing for CRA in this proceeding who is not representing or advising or otherwise assisting resellers in devising marketing plans to compete against cellular carriers; or

b. An attorney, paralegal, and other employee associated for purposes of this proceeding with an attorney described in (a) who is not representing or advising or otherwise assisting resellers in devising marketing plans to compete against cellular carriers; or

c. An unaffiliated expert or an employee of an unaffiliated expert retained by CRA for the purpose of advising in this proceeding, except those persons: who are directly

involved in or have direct supervisory responsibilities over the development of reseller marketing plans to compete against cellular carriers.

7. If parties are unable to agree on designation of reviewing representatives based on the above standards, they may seek resolution of the dispute from the assigned ALJ in this proceeding.

Dated July 19, 1994, at San Francisco, California.

/s/ THOMAS PULSIFER
Thomas Pulsifer
Administrative Law Judge